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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES MICELI, Plaintiff and Appellant, v. STAPLES, INC. et al., Defendants and Respondents.	D070224 (Super. Ct. No. 2012-00542919-CU-BT-CXC)

APPEAL from a judgment of the Superior Court of Orange County, Kim G. Dunning, Judge. Affirmed.

Hogue & Belong, Jeffrey L. Hogue and Tyler Belong; Niddrie Addams and John S. Addams for Plaintiff and Appellant.

Stroock, Stroock & Lavan, Julia B. Strickland, Marcos D. Sasso and Shannon E. Dudic for Defendants and Respondents.

Plaintiff James Miceli appeals a judgment confirming an arbitration award, arguing the trial court erred in compelling arbitration of his claims regarding certain billing policies governing his Staples credit card, issued by Citibank, N.A. (Citibank). He

asserts California law governs the credit card agreement despite a provision therein specifying South Dakota law governs the terms and enforcement of the agreement and argues, under California law: (1) defendants Staples, Inc. (Staples) and Citibank failed to prove the existence of an agreement to arbitrate because they did not produce the original card agreement governing the account; (2) the arbitration clause in the agreement was unconscionable; and (3) the arbitration clause in the agreement did not encompass all asserted claims.

Assuming, without deciding, California law applies, we conclude Staples established the existence of an agreement to arbitrate, the agreement is not unconscionable, and the agreement requires arbitration of all asserted claims. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Miceli obtained a Staples credit card, issued by Citibank, in or before June 2002, but has no recollection of receiving the written card agreement governing the account. In 2009, Citibank mailed a change-in-terms notice (Notice) and a new card agreement to Miceli along with a monthly billing statement. The Notice informed Miceli Citibank was replacing his card agreement with the new one. The Notice provided Miceli an opportunity to opt out of the new card agreement by contacting Citibank within 26 days of the next closing date on his account, at which point his account would be closed and the prior terms would govern with respect to any remaining balance. The new card agreement contained an arbitration clause, stating: "[e]ither you or we may, without the other's consent, elect mandatory, binding arbitration for any claim dispute or controversy

between you and us," and further stated Citibank could change, add, replace or remove provisions at any time and any such changes would be binding unless Miceli followed any opt out instructions provided therein. Miceli did not opt out and continued to use his Staples credit card.

Miceli also received billing statements each month regarding his Staples credit card that included a Web address for paying bills online. The statements indicated payments "must be received by 5:00 p.m. local time on Payment Due Date" but also stated online payments would be credited to the account on the same day only if they were received by 5:00 p.m. Eastern time.[1] Miceli resides in California and was charged a late fee each time he submitted his payment online before 5:00 p.m. in California but after 5:00 p.m. Eastern Standard Time.

Unhappy with these late fees, Miceli filed a class action complaint alleging causes of action for violation of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.), unfair and deceptive business practices (Bus. & Prof. Code, § 17200 et seq.) and breach of the implied covenant of good faith and fair dealing. Staples and Citibank moved to compel arbitration and submitted with their motion an exemplar of the 2009 card agreement.

Miceli opposed the motion and argued, in part, Staples and Citibank had not established the exemplar card agreement from 2009 was the agreement governing his account. In response, Staples and Citibank submitted an exemplar card agreement from

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1 The Web interface for making online payments also stated payments would be credited on the same day if received by 5:00 p.m. Eastern time.

2005 containing the same language regarding arbitration and changes to the agreement as the 2009 agreement, as well as records establishing Citibank had sent Miceli the 2009 agreement.

After hearing argument from the parties, the court granted the motion to compel arbitration, explaining Staples and Citibank had established the existence of an agreement to arbitrate and the agreement was not unconscionable. Miceli filed a petition for a writ of mandate, which the Court of Appeal denied and the parties proceeded to arbitration. Following arbitration, the court entered judgment correcting and confirming the arbitration award, from which Miceli now appeals.

DISCUSSION

I

General Legal Principles and Standard of Review

Code of Civil Procedure section 1281.2 provides in relevant part, "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy . . . the court shall order the [parties] to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists," unless there is a valid defense to enforcing the agreement. (Code Civ. Proc., § 1281.2, subds. (a)–(c).) Thus, the threshold issue in reviewing a decision to compel arbitration is whether there is a valid agreement to arbitrate. (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683.)

The party making a motion to compel arbitration has the burden of proving the existence of a valid arbitration clause covering the dispute between the parties. (*Engalla*

v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 972.) If established, the burden shifts to the opposing party to prove any facts necessary to any defense to enforcement of the agreement it presents by a preponderance of the evidence. (*Ibid*.) The trial court is the trier of fact and must weigh all documentary evidence and testimony presented by the parties to reach a final determination on the motion. (*Ibid*.)

We review de novo the trial court's ruling on a petition to compel arbitration where, as here, the parties have not introduced extrinsic evidence to aid in the interpretation of the agreement. (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc*. (2010) 186 Cal.App.4th 696, 707.) To the extent the trial court's ruling depends on the resolution of disputed facts, we accept the trial court's resolution of such facts when supported by substantial evidence, drawing every permissible inference necessary to support the judgment. (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

II

Analysis

Miceli argues the trial court erred in compelling arbitration under California law, which we assume, without deciding, applies, because Staples and Citibank did not prove the existence of an agreement to arbitrate, the arbitration clause was unconscionable, and the arbitration clause did not encompass all asserted claims.

A

Staples Established the Existence of an Agreement to Arbitrate

We first address Miceli's assertion Staples and Citibank did not prove the existence of an agreement to arbitrate because they did not produce the original agreement governing the account or otherwise establish it contained an arbitration clause or a clause allowing them to amend it to add an arbitration clause. In asserting this argument, Miceli relies solely on *Badie v. Bank of America* (1998) 67 Cal.App.4th 779 (*Badie*).

In *Badie*, the plaintiffs challenged the validity of an alternative dispute resolution (ADR) clause Bank of America (the Bank) attempted to add to its credit card account agreements via a half-page change-of-terms notice mailed with its monthly billing statements. (*Badie, supra*, 67 Cal.App.4th at p. 783, 785.) The notice stated, in part, "[i]f you or we request, any controversy with us will be decided either by arbitration or reference." (*Id*. at p. 785.) The notice did not contain an opt out provision but did note the new provision would apply to all past and future transactions if the customer continued to use his or her account. (*Ibid*.) The Bank argued neither traditional contract offer-and-acceptance principles nor Civil Code section 1698 regarding modification of a contract applied, but, instead, the notice created a valid amendment based on a provision in the original account agreement stating, "[a]ll terms are subject to change." (*Badie*, at 786.)

The court in *Badie* framed the issue as "a challenge to the Bank's interpretation of the change of terms provision in the original account agreements" and concluded the

Bank could not rely on the change of terms provision to add an entirely new term related to ADR. (*Badie, supra*, 67 Cal.App.4th at pp. 790-791.) The court noted the original agreement did not address the method or forum for resolving legal claims, reasoned the appropriate interpretation of the word "terms" included only those terms addressed in the original agreement, and, therefore, concluded the original agreement did not permit the addition of a new provision regarding ADR. (*Id*. at pp. 800, 803.) The court also noted the change-of-terms notice combined with the customer's continued use of the card also did not constitute an "unambiguous and unequivocal waiver of the right to a jury trial." (*Id*. at pp. 805-806.)

Here, Staples and Citibank did not produce the original agreement and we therefore cannot determine whether it contained an arbitration provision or a provision allowing Citibank to add an arbitration provision. However, they did not attempt to rely on the original agreement as the Bank did in *Badie*. Instead, they argued Miceli did not just agree to a change in the terms of the original agreement, but instead to a completely new agreement by continuing to use his Staples credit card after receiving it. Under California law, parties to a contract in writing may alter the contract in writing (Civ. Code, § 1698) and acceptance of a contract may be manifested by conduct as well as by words. (*Russell v. Union Oil Co*. (1970) 7 Cal.App.3d 110, 114.) As the trial court recognized, the evidence established Citibank sent Miceli a new agreement in 2009, and although the Notice gave Miceli the opportunity to reject the new agreement, he did not do so, but continued to use his Staples credit card. Miceli thus accepted the terms of the 2009 agreement, creating a generally enforceable adhesion contract. (See *Szetela v.*

Discover Bank (2002) 97 Cal.App.4th 1094, 1100 (*Szetela*) [concluding an amended cardholder agreement in the form of a "bill stuffer" accepted by the cardholder's continued use of the credit card is a generally enforceable adhesion contract]; *Meyers v. Guarantee Sav. & Loan Assn.* (1978) 79 Cal.App.3d 307, 312 [adhesion contracts generally enforceable absent other factors]).

We recognize the court in *Badie* concluded a customer's continued use of a credit card after receiving a "bill stuffer" amendment was not sufficient to establish an agreement to arbitrate (*Badie, supra*, 67 Cal.App.4th at pp. 805-806) but conclude the present case is distinguishable. In *Badie*, the court concluded the amendment did not amount to knowing consent because the conditional clause "if you or we request" was potentially misleading and the method used to disseminate the notice suggested the Bank intended to reduce the likelihood the customer would read it or object. (*Ibid*.) In contrast to the ambiguous language of the notice in *Badie*, the 2009 agreement here clearly stated, "[e]ither you or we may, *without the other's consent*, elect mandatory, binding arbitration." (Italics added.) Further, in *Badie* the Bank included only a half-page change-in-terms notice in the monthly statement whereas here Citibank referenced the new agreement on the front of the billing statement and included the two-page Notice as well as the complete new agreement. Finally, also in contrast with *Badie*, the Notice here indicated Miceli had the right to opt out within 26 days of his next closing date, at which point Citibank would close his account and he could repay the balance under the previous terms. (See *Cayanan v. Citi Holdings, Inc.* (S.D.Cal. 2013) 928 F.Supp.2d 1182, 1200 [concluding "*Badie* did not hold that bill stuffer notices are *per se* invalid" and

distinguishing it based on opt out provision]; *Ackerberg v. Citicorp USA, Inc*. (N.D.Cal. 2012) 898 F.Supp.2d 1172, 1176 [distinguishing *Badie* based on opt out provision].)

Based on the foregoing, we conclude Staples and Citibank presented sufficient evidence to establish Miceli received the 2009 agreement and consented to its terms, including the arbitration provision, by continuing to use his card. As such, they established the existence of a valid agreement to arbitrate.

B

The Arbitration Clause in the 2009 Card Agreement is Not Unconscionable

We turn next to Miceli's argument the arbitration clause in the 2009 agreement is unenforceable because it is unconscionable under California law.

Where there is an agreement to arbitrate, courts may refuse to enforce, or limit the application of, the arbitration clause if it is both procedurally and substantively unconscionable. (Civ. Code, § 1670.5, subd. (a); *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247 (*Pinnacle*).) Although both substantive and procedural unconscionability must be present, they need not be present to the same degree. (*Pinnacle*, at p. 247.) The party challenging the enforceability of a contractual provision bears the burden of proving unconscionability. (*Ibid*.)

The trial court here found the 2009 card agreement was neither procedurally nor substantively unconscionable. We conclude there were elements of procedural unconscionability but agree the arbitration clause was not substantively unconscionable.

1. *Procedural Unconscionability*

Miceli asserts the agreement was procedurally unconscionable because Citibank offered it on a take-it-or-leave-it basis, it was included with a monthly bill, the arbitration clause was on pages 14 through 17 of an 18-page agreement, and Citibank did not provide a copy of the referenced arbitration rules.

Unconscionability analysis typically begins with examining whether the contract is a contract of adhesion; whether the party of superior bargaining strength drafted and imposed the provision at issue while the other party had the option to take it or leave it. (*Pinnacle, supra*, 55 Cal.4th at p. 246; *Little v. Auto Stiegler, Inc*. (2003) 29 Cal.4th 1064, 1071 [defining procedurally unconscionable adhesion contract as one drafted by the party with superior bargaining power leaving the other party only the option to adhere to or reject the contract].) Here, Citibank, the party with superior bargaining power, provided the 2009 agreement on a take-it-or-leave-it basis, with continuing use of the credit card constituting acceptance. Although Staples and Citibank argue Miceli had alternative forms of payment available, thus defeating his claims of oppression, this argument is unavailing in light of precedent concluding this type of agreement is a procedurally unconscionable adhesion contract. (See, e.g., *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 160 [amendment to a cardholder agreement in the form of a "bill stuffer" is procedurally unconscionable adhesion contract], overruled on other grounds in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 346-347 (*Concepcion*); *Szetela, supra*, 97 Cal.App.4th at p. 1094 [same].) We therefore conclude the adhesive nature of the 2009 agreement establishes at least some degree of procedural unconscionability.

Miceli's remaining arguments are less persuasive. Miceli argues the arbitration clause was unconscionable because it was on pages 14 through 17 of an 18-page agreement and therefore inconspicuous and because Citibank did not provide a copy of the referenced arbitration rules. Miceli relies primarily on *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387 for both assertions. While "[l]ack of prominence is one factor the court may consider in determining if the clause is procedurally unconscionable," the arbitration clause in *Trivedi* was no more conspicuous than any other provision in the agreement. (*Id*. at p. 392, fn. 1.) Here, the two-page Notice noted the inclusion of the arbitration clause in bold print and the arbitration clause itself was introduced in bold print and capital letters, making it the most prominent paragraph in the agreement. With respect to the arbitration rules, the California Supreme Court has specifically addressed the holding in *Trivedi*, while disapproving it on other grounds, and clarified the failure to include arbitration rules constitutes procedural unconscionability only where the plaintiff's unconscionability claim depends on an actual term in the arbitration rules. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246.) Miceli makes no such claim here.

Based on the foregoing, we conclude the adhesive nature of the 2009 card agreement indicates procedural unconscionability, but the prominence of the arbitration clause and the lack of inclusion of the applicable rules of arbitration do not.

2. *Substantive Unconscionability*

Miceli next argues the arbitration clause was substantively unconscionable because it did not guarantee the recovery of attorney fees and costs to the prevailing party

whereas an award of fees and costs would be mandatory to a prevailing plaintiff under the Consumers Legal Remedies Act (Civ. Code, §1750 et seq.) (CLRA).[2]

Under California law, a provision is substantively unconscionable if it imposes harsh or oppressive terms or is so one-sided as to shock the conscience. (*Walnut Producers of California v. Diamond Foods, Inc*. (2010) 187 Cal.App.4th 634, 647.) The Federal Arbitration Act (9 USC § 1 et seq.) (FAA) strongly favors the enforcement of agreements to arbitrate and preempts any determination a provision in an arbitration clause is substantively unconscionable if the determination ' "interfere[s] with fundamental attributes of arbitration,' " including " ' "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." ' " (*Sanchez, supra*, 61 Cal.4th at pp. 906, 913, quoting *Concepcion, supra,* 563 U.S. at pp. 344, 348.) The California Supreme Court, recognizing this limitation, recently set forth a case-by-case test for determining whether an agreement in the consumer context is substantively unconscionable based on a fees provision; under that test, a plaintiff may resist the enforcement of an arbitration agreement that imposes unaffordable fees or would have a substantial deterrent effect in their case. (*Sanchez,* at pp. 919-920.)

The fees provision here stated "[e]ach party will bear the expense of that party's attorneys, experts and witnesses, and other expenses, regardless of which party prevails,

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2 Originally, Miceli also asserted the card agreement was substantively unconscionable due to a waiver of class action rights under the CLRA but concedes in his reply the California Supreme Court's recent ruling in *Sanchez v. Valencia Holding Co.* (2015) 61 Cal.4th 899 (*Sanchez*) precludes this argument. As such, we need not address this argument here.

but a party may recover any or all expenses from another party if the arbitrator, applying applicable law, so determines." Miceli does not contend the fees provision imposed unaffordable fees or created a substantial deterrent in the present case, but argues this provision imposes a greater burden on the cardholder because an award of fees and costs would be mandatory to a prevailing plaintiff under the CLRA. To the contrary, the cardholder agreement expressly allows either party to recover any or all expenses from the other if applicable law so requires. Thus, if a cardholder were to prevail at arbitration on a claim under the CLRA, the cardholder would presumably also be entitled to fees and costs in accordance with the CLRA. (See Civ. Code, § 1780, subd. (e).) Further, even under the CLRA, the plaintiff is only entitled to fees if they prevail (*ibid.*) and, therefore, must cover his or her own fees and expenses during the course of the litigation, just as the arbitration provision here requires. The authorities Miceli relies on to support his position the fees provision was nevertheless unconscionable are of questionable authority and distinguishable from the present case. (See *Trivedi, supra*, 189 Cal.App.4th at pp. 394-395 [concerning an arbitration clause in an employment contract], disapproved in *Baltazar, supra*, 62 Cal.4th 1237; *Sanchez, supra*, 61 Cal.4th at p. 919 [distinguishing the test for the unconscionability of a fees provision in the consumer, as opposed to employment, context]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1086 [concerning fees provision requiring each party to bear their own fees regardless of applicable law]; *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1136 [characterizing *Broughton* as questionable authority following *Concepcion*].)

As the fees provision does not impose unaffordable fees or create a substantial deterrent, we conclude it does not render the arbitration clause substantively unconscionable. (See *Sanchez, supra*, 61 Cal.4th at p. 921.) Further, because a finding of unconscionability requires both procedural and substantive unconscionability (see *Pinnacle, supra*, 55 Cal.4th at p. 247), we conclude the arbitration clause in the agreement is not unconscionable.

C

The Agreement to Arbitrate Encompasses All Asserted Claims

Finally, Miceli argues, for the first time on appeal, the arbitration clause in the 2009 agreement did not encompass any asserted claims predating his receipt of the agreement in April 2009. We need not consider new theories raised on appeal, even where those theories raise only questions of law. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.) As Miceli did not raise this argument below, it is not necessary for us to consider it now.

Moreover, we conclude the agreement to arbitrate encompasses all asserted claims in any event. The strong public policy in favor of arbitration also requires courts to resolve any doubts regarding arbitrability in favor of arbitration. (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 626; *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686.) Here, the arbitration clause in the 2009 agreement indicates all claims between the parties are subject to arbitration, and does not include a time limit. Further, the 2005 agreement contained the same clause and Miceli has not actually alleged Staples and Citibank

assessed him a late fee prior to 2009, let alone 2005. We therefore conclude the arbitration agreement encompasses all asserted claims.

DISPOSITION

The judgment is affirmed. Staples and Citibank are awarded their costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.